

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-4092

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-4092

HARDER SERVICES, INC.

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

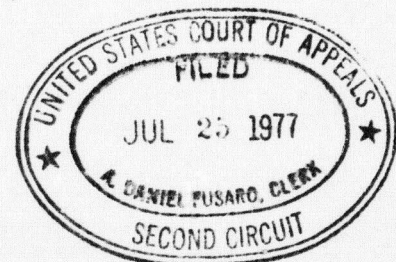
Respondent-Appellee

BRIEF FOR PETITIONER - APPELLANT

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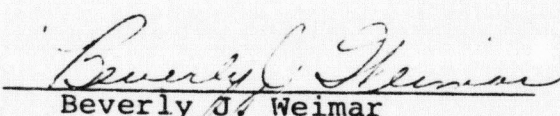
COMMISSIONER OF INTERNAL REVENUE,

Respondent - Appellee

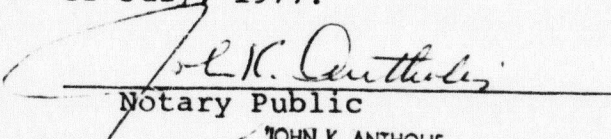
BRIEF FOR THE PETITIONER - APPELLANT

Certificate of Service

I, Beverly J. Weimar, hereby certify that on this 25th day of July, 1977, I placed in the U. S. mail at New York, New York, addressed to Myron C. Baum, Esq., Acting Assistant Attorney General, Tax Division, United States Department of Justice, Washington, D. C. 20530, to the attention of MCB:GEA:JECrowe:mwd 5-13656, four copies of the Brief, Appendix Record, and Appendix Record Exhibition Volume in the above-captioned proceeding.


Beverly J. Weimar

Subscribed and sworn to
before me this 25th day
of July, 1977.


Notary Public

JOHN K. ANTHOLIS
Notary Public, State of New York
No. 31-4507183
Qualified in New York County
Commission Expires March 30, 1979

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v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent - Appellee

BRIEF FOR THE PETITIONER - APPELLANT

Statement of Issues Presented

This is an appeal by Harder Services, Inc., (formerly Harder Extermination Service, Inc.) from a final decision of the United States Tax Court entered December 29, 1976, (App. 3) after trial before the Honorable Judge William M. Fay. The findings of fact and opinion of the Tax Court (App.4-32) are reported as 67 T.C. No. 42.

This case involves deficiencies in corporate income taxes for the taxable years and in the amounts as follows:

<u>Taxable Year</u> <u>Ended 12/31</u>	<u>Deficiency</u>
1964	\$ 1,399.99
1965	1,252.50
1966	6.22
1968	<u>15,008.04</u>
Total	\$17,666.75

A brief statement of the issues raised by this appeal are as follows:

In 1968, Harder Tree Service, Inc. (a New York corporation), was merged into Harder Extermination Service, Inc. (also a New York Corporation). Simultaneously, the latter corporation changed its name to Harder Services, Inc., the Petitioner-Appellant in this appeal, and the party which shall be liable as a transferee for any deficiency that may be due as a result of these proceedings. In July of 1964, Harder Tree acquired by statutory merger Cardinal Maintenance Corp., a corporation, all the stock of which was owned by Philip A. Rogers. Mr. Rogers was issued 22 shares of Harder Tree Stock which constituted 11 percent of the issued and outstanding stock of Harder Tree.

At the time of the merger, Rogers and Harder Tree executed an employment agreement and a stock option agreement, which documents provided, inter alia, that Harder Tree had the option to purchase or Rogers had the option to force Harder Tree to purchase all the stock owned by Rogers with such option

being exercisable within six months after the termination of Rogers' employment. The price for such repurchase by Harder Tree was to be determined by a formula based upon a multiple of gross sales. The business of Cardinal Maintenance Corp. was operated by Harder Tree by a newly formed subsidiary, Cardinal Maintenance, Inc., which business lost money continuously notwithstanding a dramatic increase in sales. In 1967, Roger's employment was terminated and his Harder Tree stock was repurchased by Harder Tree for \$100,677.44. Harder Tree, on its corporate tax return for the year 1967, claimed a loss of \$100,677.44 as a loss resulting from worthless stock of a subsidiary under Section 165(g)(3) of the Internal Revenue Code of 1954. Appellee, on audit, disallowed the loss asserting that such amounts were capital in nature and the cost to Harder Tree of acquiring its own stock. At hearing before the United States Tax Court, Appellant argued that the \$100,677.44 paid by Harder Tree to Rogers was (1) an additional contribution of capital to Harder Tree's wholly owned subsidiary and that when the stock of such subsidiary became worthless, Harder Tree was entitled to an ordinary loss under Section 165 (g)(3) of the Code; (2) such payment was deductible as an ordinary and necessary business expense in order that it might relieve itself of an onerous and burdensome contract; or (3) that to the extent the amount paid to Rogers exceeded the fair market value of what was received (the 22 shares of

Harder Tree stock) such payment was either additional compensation or termination pay. In its opinion, the United States Tax Court held, that the payment by Harder Tree to Rogers for repurchase of his Harder Tree stock was not an additional contribution to the capital of Cardinal Maintenance, Inc.; was a capital transaction under Section 311(a) of the Code, giving rise to no gain or loss; did not represent an ordinary and necessary business expense under Section 162 of the Code; and to the extent that the amount paid for the stock exceeded the fair market value of such stock, did not constitute additional compensation or termination pay to Rogers.¹

The Appellant respectfully submits that the Tax Court erred, as a matter of law, in reaching its conclusions that: (1) some or all of the amount paid was not an additional investment in Cardinal Maintenance, Inc.; (2) the payment of the \$100,677.44 was solely for the repurchase of stock and thus a capital transaction under Section 311(a) of the Code; (3) such amount was not an ordinary and necessary business expense under Section 162 of the Code; and (4) such amount, to the extent it exceeded fair market value of the stock received, did not constitute some sort of compensation to Rogers.

¹ The Tax Court also determined that Appellant is liable as a transferee, which issue is not the subject of this appeal.

Specifically, the Tax Court erred in finding: (1) that it did not allow a deduction under 165(g)(3) of the Code notwithstanding a finding that the payment was made "to get rid of the Cardinal operation altogether;" (2) that it did not give the real substantive meaning to the transaction rather it adhered to the form of such transaction; (3) that petitioner did not establish that continuance of the "stock option" agreement was a threat to the survival of the continuance of Harder Tree's business; and (4) that it failed to give any credence to the facts of record which uncontrovertibly proved that the true value of the 22 shares of Harder Tree stock in January, 1967, was merely \$4,872; and that the excess paid by Harder Tree to Rogers represented something other than a capital transaction.

STATUTES

TITLE 26, SECTION 162(a)(1) U.S. CODE

"Sec. 162. TRADE OR BUSINESS EXPENSES.

(a) IN GENERAL. - There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including -

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;"

TITLE 26, SECTION 165(g)(1) and (3) U.S. CODE

"Sec. 165. LOSSES.

(g) WORTHLESS SECURITIES. -

(1) GENERAL RULE. - If any security which is a capital asset becomes worthless during the taxable year, the loss resulting therefrom shall, for purposes of this subtitle, be treated as a loss from the sale or exchange, on the last day of the taxable year, of a capital asset.

(2) * * *

(3) SECURITIES IN AFFILIATED CORPORATION. - For purposes of paragraph (1), any security in a corporation affiliated with a taxpayer which is a domestic corporation shall not be treated as a capital asset. For purposes of the preceding sentence, a corporation shall be treated as

affiliated with the taxpayer only if -

(A) at least 95 percent of each class of its stock is owned directly by the taxpayer, and

(B) more than 90 percent of the aggregate of its gross receipts for all taxable years has been from sources other than royalties, rents (except rents derived from rental of properties to employees of the corporation in the ordinary course of its operating business), dividends, interest (except interest received on deferred purchase price of operating assets sold), annuities, and gains from sales or exchanges of stocks and securities.

In computing gross receipts for purposes of the preceding sentence, gross receipts from sales or exchanges of stocks and securities shall be taken into account only to the extent of gains therefrom."

TITLE 26, SECTION 311(a) U.S. CODE

"Sec. 311. TAXABILITY OF CORPORATION ON DISTRIBUTION.

(a) GENERAL RULE. - Except as provided in subsections (b) and (c) of this section and section 453(d), no gain or loss shall be recognized to a corporation on the distribution, with respect to its stock, of -

(1) its stock (or rights to acquire its stock), or

(2) property.."

Statement of Facts

The pertinent facts as found by the Tax Court (App. 4-32), stipulated by the parties (App. 33-40), or established by the record below, are set forth hereinafter.

The Appellant, Harder Services, Inc. (formerly: Ha. ler Extermination Service, Inc.) was incorporated under the laws of the State of New York on March 1, 1932. On December 18, 1968, Harder Tree Service, Inc., and two other brother-sister corporations were merged into part of Harder Extermination Service, Inc., which subsequently changed its corporate name to Harder Services, Inc. (App. 33-34)

At the time of the filing of the petition in the Tax Court, the Appellant's principal place of business was located in Hempstead, New York. (App. 6) Therefore, the jurisdiction of this court was invoked under Section 7482 and 7483 of the Internal Revenue Service Code 1954.

Cardinal Maintenance Corporation (hereinafter referred to as Maintenance Corp.) was incorporated under the laws of the State of New York on May 13, 1963. As of July 1, 1964, the sole stockholder of Maintenance Corp. was Philip A. Rogers. On July 31, 1964, Maintenance Corp. was merged into Harder Tree Service, Inc., (hereinafter referred to as Harder Tree), and the stock of Maintenance Corp. was cancelled. On

the same date, 22 shares of Harder Tree common stock were issued to Mr. Rogers. Such 22 shares represented 11% of the 200 issued and outstanding shares of common stock of Harder Tree. (App. 34)

Concurrent with the merger of Maintenance Corp. and Harder Tree, Harder Tree created a new wholly owned subsidiary known as Cardinal Maintenance, Inc. (hereinafter referred to as Cardinal). The assets acquired in the afore-described merger (in which Maintenance Corp. was a party) were contributed as capital to the newly created subsidiary Cardinal. (App. 34-35)

All of the Harder companies including Harder Tree and the Appellant were during the years in question controlled by F. Kenneth Harder (hereinafter "Mr. Harder") and his wife and were engaged in the pest control and tree service business. (App. 7 and 64) Frank Harder (the son of F. Kenneth Harder and hereinafter referred to as "Frank") was also active in this business, and he served as President of the Appellant and an officer and director of Harder Tree. (App. 7)

In 1964, the Harders began to consider the acquisition of an office maintenance and cleaning company. They believed that such acquisition would complement their pest control operations and put them in a better position to compete with

larger companies which offered pest control services as part of, or in addition to, their normal office cleaning services. In a discussion between Mr. Harder and Frank, it was suggested that one possible acquisition might be Cardinal Maintenance Corp., a firm which had the cleaning contract on the Harder Services. The Harders had known Philip Rogers for many years; further, Rogers was the brother-in-law of Richard Valentine, an attorney who the Harders had known since he was a child. (App. 7-8)

Frank then broached the subject to Rogers, who was receptive to the idea of his company becoming part of the Harder organization. Eventually, the details of the possible merger transaction were discussed by Frank, Rogers, and Valentine, and the documents were prepared by Valentine. Since Valentine had in the past served as attorney for both Rogers and Harder in other matters, he was the only attorney involved in the merger planning, and he purported to represent both sides in the proposed merger transaction. Mr. Harder did not concern himself with the details of the transaction which he left up to Valentine. Valentine prepared the documents for the transaction and presented them to the Harders for review on July 23, 1964. On July 31, 1964, the closing was held, attended by Mr. Harder, Frank, their accountant,

Rogers, and Valentine. At the closing, Valentine reviewed the agreement of merger with all of the persons attending, (App. 8-9)

Both Mr. Harder and Frank were of the view that they were acquiring a small corporation and that they did not think that it would amount to any great success; that they had complete confidence in Richard Valentine who had drawn the document and had advised them that this was the wise thing to do; and that if at any time it became necessary for either Harder Tree, Mr. Harder or Mr. Rogers to exercise any of the options under the agreement, that Mr. Rogers would receive somewhere between \$10,000 and \$20,000 for the 22 shares of Harder Tree stock. (App. 76-77 & 86-87)

The relevant provisions of the merger plan executed July 31, 1964, may be summarized as follows: Rogers' company, Cardinal Maintenance Corp., was merged into Harder Tree, and the stock of Maintenance Corp. was cancelled. Twenty-two shares of Harder Tree common stock were issued to Rogers, representing 11% of the total of 200 Harder Tree shares outstanding. The balance of such outstanding shares was owned by the Harders. Concurrently, Harder Tree created a new wholly owned subsidiary named Cardinal Maintenance, Inc. The assets and business acquired by Harder Tree in the merger

were contributed as capital to the newly created subsidiary.
(App. 9)

At the time of the closing on July 31, 1964, the parties placed a fair market value on the 22 shares of Harder Tree stock as being \$9,200 (Pet. Ex. 32, Item 10). An identical value was placed on the stock of Cardinal Maintenance Corp. as of July 31, 1964 (Pet. Ex. 32, Item 17). See also App. 87-88 for testimony of Frank Harder as to how such value was arrived at by the parties.

At the time of the merger closing, Harder Tree entered into an employment contract with Rogers pursuant to which Rogers was to be paid a minimum salary of \$1,000 a month; he was to give his best effort and skill exclusively to the business and interests of Harder Tree and its affiliates; he was to be precluded from competing with Harder Tree's or Cardinal's business for five years after he terminated his employment; and he was to be precluded from divulging trade secrets during his employment and for five years after termination of his employment. Either party had the right to cancel and terminate employment upon two weeks' notice to the other party. Rogers was also elected a director and officer of Harder Tree and Cardinal. (App. 10 & Jt. Ex. 8H)

As an integral part of the merger transaction, there was also executed a "Stock Option Agreement" between Harder Tree, F. Kenneth Harder and Philip A. Rogers. Among other things, that agreement provided a grant to Harder Tree of an option to purchase any and all shares of stock of Harder Tree owned by Rogers for a period of six months commencing with the date of termination of Rogers' employment with Harder Tree for any reason. Harder Tree granted to Rogers, or his trustees, an option to sell to Harder Tree all or any part of the shares of stock of Harder Tree owned by Rogers for a period of six months commencing on the date of termination of Rogers' employment with Harder Tree for any reason other than death, or his resignation as an employee of Harder Tree; or for a period of six months from the date of Rogers' resignation because Rogers' annual rate of salary, excluding bonuses, in the two calendar years immediately preceding the date of his resignation was below \$12,000. The option price to be paid by Harder Tree in the event that Harder Tree or Rogers exercised their options was an amount determined by:

(a) Multiplying the value of all the outstanding stock of Harder Tree by a fraction of which the numerator is the number of shares being sold and the denominator is the total number of shares of Harder Tree outstanding.

(b) The value of all the outstanding stock of Harder Tree was to be an amount equal to the average annual gross receipts of Harder Tree and all its subsidiaries on a consolidated basis for 24 calendar months ending on the last day of the calendar month immediately preceding the month in which the right to exercise arose, except that if the right to exercise arose prior to August 1, 1967, such value was to be an amount equal to such annual gross receipts for 12 calendar months. (App. 10-12; Jt. Ex. 9-I)

The Tax Court in its opinion ambiguously found at the top of page 6 (App. 9) of its opinion:

"* * *The documents were reviewed by Mr. Harder and Frank and by another officer of the Harder Companies, as well as Harder's outside accountant.* * *"

Although Mr. Harder and Frank read the Agreement of Merger, including the Stock Option Agreement, prior to the closing on July 31, 1964, neither of these two principals realized that the option price formula based upon gross sales without regard to net income, might result in a price truly unrelated

to the true value of the stock. This was brought to their attention in November 1966 by their accountant, Mr. Keith Baker. (App. 12-14) Mark Wood, Treasurer of Harder Tree, did not have an opportunity to review any of the documents or discuss any aspects of the transaction with the Harders prior to July 31, 1964. (Jt. Ex. 30-DD, p. 10) Mr. Keith Baker examined the Agreement of Merger prior to the closing but such document did not have attached to it the enumerated (lettered) exhibits (pp. 44 and 45); he examined the Employment Covenant Agreement at the closing (App. 44); but he did not see the Stock Option Agreement until sometime in 1966 (App. 45).

For the first two years following the merger transaction, Cardinal failed to operate profitably, although realizing substantial gross sales. For the calendar year 1966, Cardinal had sales of \$451,139.58 and its parent, Harder Tree, had sales of \$374,109.85. (App. 12)

During the year 1966, Harder's outside accountant, Keith Baker, recommended to Mr. Harder that all of the several Harder companies be merged into a single entity for administrative and accounting reasons and for possible financial and tax benefits. In the course of analyzing the feasibility of such a combination, Baker had occasion to review the

employment and option agreements executed between Harder Tree and Rogers in 1964. In November 1966, Baker sent a memorandum to Mr. Harder expressing the opinion that if the desired merger of the Harder companies was to be accomplished, the Rogers' stock option agreement must be cancelled and a new agreement negotiated for the following reasons:

1. In a merger, Harder Tree would be dissolved and no longer be a party to the agreement.
2. The consolidated sales of Harder Tree and Cardinal would become commingled with the sales of the other Harder companies, thus rendering inoperable the method prescribed for the valuation of stock under the option agreement.
3. Rogers would become the owner of stock of the merged company, thereby acquiring an interest in the assets and profits of all five of the Harder companies, rather than just his interest in the operations of Harder Tree and Cardinal; and that another method of valuation will have to be arrived at, since the prior agreement did not provide for a valuation method under these circumstances.
4. The valuation method prescribed in the option agreement was improper since it is based primarily on

sales, presumably upon the original assumption that such sales would yield normal rates of profit, increasing as sales increase, whereas in the case of Cardinal no net profits had been realized after more than two years of operations. "Obviously then, a valuation based on unprofitable sales is not a proper valuation method, since it places an unreal value on the capital stock of a company, that, without infusions of capital by its parent, could not survive." (App. 13-14; Pet. Ex. 31, p. 2; emphasis added)²

5. The continued existence of the option agreement would probably foreclose the newly merged company from obtaining major debt or equity financing. (App. 12-14)

Upon receiving the afore-described memorandum from Keith Baker in November 1966, Mr. Harder and Frank, for the first time, realized the significance of the valuation method prescribed in the 1964 stock option agreement entered into with Rogers. (App. 77 and 87) Mr. Baker in his memorandum, after describing other methods of valuation, recommended that a new agreement be negotiated which would (1) utilize a valuation based on a "price-earnings ratio"; (2) contain a provision for payment over a two or three-year period; (3) be

²It is significant that the Tax Court omitted from its findings this critical portion of Mr. Baker's memorandum which Appellant submits is an obvious manifestation on the question of business survival.

entered into solely between the corporation and Rogers; and (4) clearly state that the method of valuation only relates to the stock owned by Rogers and not to shares owned by any other shareholder (Pet. Ex. 31).

In initially reviewing the 1964 merger documents, the Harders had relied heavily upon their confidence in Valentine, their trusted attorney and brother-in-law of Philip Rogers (App. 14). After receiving Mr. Baker's memorandum of November 10, 1966 (Pet. Ex. 31) and reviewing it with Mr. Baker, and upon Mr. Baker's recommendation, Mr. Harder retained Alfred A. Marra, an attorney, to advise him with respect to Rogers' situation. Marra reviewed the entire history of the 1964 transaction and formed an opinion that the stock option agreement should be abrogated on the basis that Valentine should not have represented both sides of the transaction, and that the valuation formula under the agreement drafted by Valentine was unconscionable, since it was based on gross sales and not upon earnings, and that the agreement was a case of over-reaching (App. 103-104). Marra recommended in the strongest terms that the Harders take the matter to the courts and seek to have the agreement voided (App. 15 and 16). Mark Wood also had reservations about the formula and thought that the formula price for the

stock was completely out of line for its true value. He brought this matter to the attention of, and discussed it with, Mr. Harder and Frank (App. 16).

However, because of the involvement of Valentine, who had been a long-time friend of the Harders and who was Rogers' brother-in-law, the Harders were afraid to litigate the matter. Among other considerations, they felt that the Valentine family was too wealthy and powerful to take on in a court battle and that ultimately they might lose their business (App. 81 and 89). Accordingly, the Harders decided to resolve the matter by simply paying Rogers the \$100,677.44 formula repurchase price, although such price was considerably in excess of the true value of such stock (App. 16).

Although the 1964 employee agreement provided for termination by either party, the stock option agreement provided that if Rogers' employment were to be terminated by Harder Tree, Rogers could force Harder Tree to repurchase his 22 shares of Harder Tree stock at a price determined by the formula keyed to gross sales. Keith Baker had advised the Harders that if Rogers were dismissed as at the end of 1966, the repurchase price under the formula would be \$100,677.44, an amount which was totally unrelated to the true value of Rogers' 22 shares.

After reviewing the advice received from Messrs. Baker, Marra and Wood, Mr. Harder determined that it would be necessary to terminate the relationship with Rogers (App. 14, 15, 78 and 79). The payment of \$100,677.44 to Philip Rogers

was in Mr. Harder's estimation "burglary" (App. 78). He knew that he could not buy the stock back without discharging Rogers; that he could not discharge Rogers without buying the stock back; that he did not want to continue Rogers in the employ of Harder Tree or Cardinal and that by making the payment he intended to get rid of Rogers and Cardinal (App. 81-82).

Thus, in January 1967, Harder Tree formally terminated the employment of Rogers and exercised its option to purchase the stock. In February 1967, Harder Tree paid Rogers \$100,677.44. Rogers delivered his shares to Harder Tree and Rogers was removed as an officer and director of both Harder Tree and Cardinal Maintenance (App. 16).

The continuance of the failing, profitless situation of Cardinal was dragging Harder Tree down financially. (App. 58-59) Mr. Harder wanted to get rid of the Cardinal corporate entity, since it was a losing proposition and a fight with the Valentine family in the Courts would take years and years and would have put the Harder companies out of business. (App. 81) The stock had no meaning to Frank; he just wanted to get rid of Rogers and the corporation; and that was the purpose for making the payment. (App. 82 and 89) The very survival of Harder Tree as well as the other Harder entities was at stake. (App. 58-59, 81-82, 89 & Pet. Ex. 32)

In order to effect the payment of \$100,677.44, Harder Tree borrowed the money from Harder Extermination Service, Inc., which in turn arranged financing to provide such funds to Harder Tree (see Jt. Ex. 10-J, Minutes of the Special Meeting of the Board of Directors of Harder Tree Service, Inc., of September 1, 1966).³

In this regard, we note that the Tax Court in F.N. 5 of its opinion erroneously placed great emphasis on the fact that Harder Tree was able to and did pay Rogers over \$100,000 in cash, despite the advice of Mr. Harder's attorney to disclaim its obligation to do so, giving an opinion that such fact undermines any argument that Rogers' potential right to force such payment in the future constituted a threat to Harder Tree's survival. (App. 26) The facts of record indicate, however, that as of 12/31/66, Harder Tree Service, Inc., had only \$3,286.85 in cash (see Balance Sheet on Form 1120-U.S. Corporation Income Tax Return, Jt. Ex. 20-T, p. 4).

³Should the court decide to remand this appeal to the Tax Court for further proceedings, Appellant will be prepared to demonstrate that F. Kenneth Harder personally borrowed \$100,000 from a bank, loaned that amount to Harder Extermination Service, Inc., which in turn loaned the same amount to Harder Tree Service, Inc., in order to provide the funds to pay off Rogers.

In September 1967, the Harders took steps to sell the business and the assets of Cardinal and in December, 1967 Cardinal was formally dissolved (App. 17).

The \$100,677.44 paid by Harder Tree to Rogers in 1967 was treated on the books of Harder Tree as an additional investment in its subsidiary, Cardinal, bringing its total basis in its Cardinal investment to \$103,520.60. In its income tax return for 1967 Harder Tree claimed the following deduction in connection with the dissolution of Cardinal:

Loss on investment in and advances to Cardinal Maintenance, Inc.--a wholly owned subsidiary dissolved in 1967	\$110,563.30
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This amount claimed was computed as follows:

Total amount treated as capital contributions to Cardinal (i.e., basis of investment)	\$103,520.60
Uncollectible liability from Cardinal to Harder Tree	<u>7,042.70</u>
Total	\$110,563.30

Harder Tree's 1967 return reported a net loss of \$108,670.13, taking into account the above-mentioned deduction of \$110,563.30 with respect to Cardinal. This net loss was then applied as a net operating loss carryback and carryforward to reduce the net income of Harder Tree (and its successor) for the years 1964 through 1966 and 1968 through 1972. Respondent has adjusted the reported 1967 net loss and resulting carryover and carryback deductions for 1964 through 1966 and 1968 to the

extent of \$100,677.44, the portion of the written-off investment in Cardinal representing the payment to Rogers in January 1967 (App.17 and 18).

At the trial, William A. Gill, a qualified securities analyst and appraiser, testified that the 22 shares of Harder Tree stock had, in his opinion, a fair market value of \$4,872. as of January 1967. Based on a thorough analysis of the performance of Harder Tree Service, Inc. and Cardinal Maintenance, Inc., Mr. Gill reached the following evaluation conclusions for the 22 shares of Harder Tree stock as of January 1967:

<u>Earnings:</u>	<u>Years Ended 12/31</u>			<u>3 Year Average</u>
	<u>1964</u>	<u>1965</u>	<u>1966</u>	
	\$	\$	\$	\$
Harder	12,993	5,693	28	
Cardinal	597	(1,038)	5,559	
Net Income Before Taxes	13,590	4,655	5,587	
Income Taxes (22%)	3,000	1,025	1,230	
Net Income	<u>10,590</u>	<u>3,630</u>	<u>4,357</u>	<u>6,192</u>

Book Value - December 31, 1966

Harder	40,590	
Cardinal	<u>1,279</u>	
Total		<u>41,869</u>

Valuation:

Capitalization of Earnings:
\$6,192 at 9 Times \$55,728

Book Value Relationship:
\$41,869 at 149% 62,385

Fair Market Value of Total
Enterprise (Average) \$59,057

Fair Market Value Per Share
(200 Shares) \$ 295.28

Value of Minority Block of 22 Shares:

Discount of 25% Applied for Minority
Interest and Lack of Marketability -
Per Share Value \$ 221.46

Fair Market Value of 22 Shares \$4,872

(Pet.Ex. 34; App. 120-122)

Argument

Point I

I. The Tax Court erred as a matter of law in its finding that the \$100,677.44 paid to Philip Rogers by Harder Tree Service, Inc., was not an additional investment by that entity in its wholly-owned subsidiary, Cardinal Maintenance, Inc.; thereby entitling Harder Tree Service, Inc., to deduct its entire investment in the common stock of Cardinal Maintenance, Inc., as "worthless securities" under Section 165(g)(3) of the Internal Revenue Service Code.

On its 1967 income tax return, Harder Tree Service, Inc., treated the payment of \$100,677.44 to Philip A. Rogers as an additional investment in its wholly-owned subsidiary, Cardinal Maintenance, Inc. The stock of Cardinal, at its increased basis (i.e., increased by the amount of \$100,677.44) was written off under Section 165(g)(3)⁴ of the

⁴"Section 165(g)(1) of the Code provides that if any security which is a capital asset becomes worthless during the taxable year, the loss resulting therefrom shall be treated as a loss from the sale or exchange of a capital asset. Paragraph (3) under Section 165(g) provides that for purposes of Paragraph (1), any security in a corporation affiliated with a taxpayer which is a domestic corporation shall not be treated as a capital asset. A corporation was treated as an affiliate, during the years in question only if the taxpayer owned stock having at least 95% of the voting power and owned at least 95% of each class of stock; and more than 90% of the gross income of such affiliate during all taxable years has been derived from sources other than passive investment type income.

There is no dispute that in the instant case Cardinal was an affiliate with the meaning of Section 165(g)(3) during the years in question. Harder Tree Service, Inc. owned all of the outstanding shares of stock of Cardinal from its inception in July, 1964 until its dissolution in December of 1967. All of its income during its years of existence was derived from sources other than from passive type investments."

Code⁵ becoming worthless during the taxable year 1967. The Tax Court without discussing the legal issues involved in Petitioner-Appellant's argument merely brushed this argument aside with a footnote (see f.n. 4 at App. 20) by stating:

* * * The only merit which we can find in this theoretical reconstruction of the transaction (which theory is inconsistent with petitioner's own evidence in support of the deduction under Section 162) is that it dutifully attempts to support the approach originally taken in the tax return."

It is clear that a taxpayer arguing the merits of his case either before the United States Tax Court or any other Federal tribunal, is entitled to argue alternative theories and submit alternative evidence in support of the claimed deduction. See, Tax Court Rule 31(c).

The taxpayer argued before the Tax Court that the amount paid to Philip Rogers was in effect an additional investment in Cardinal Maintenance, Inc. The basis for such argument is that the Court should have looked at the substance of the transaction rather than its form. It's well settled that the Courts are concerned with the substance and reality of the transaction and that the formal written documents are not rigidly binding, Helvering v. F. & R. Lazarus & Co., 308 U.S. 252 (1939). Further, the taxpayer as well as

⁵All sections referred to relate to those contained in the Internal Revenue Code of 1954, as in effect during the year 1967.

the government is entitled to the benefit of the rule that substance rather than form of a transaction controls.

Landa v. Commissioner, 206 F.2d 431 (D.C. Cir. 1953);

Frank Ciaio v. Commissioner, 47 T.C. 447 (1967).

In the case Gussow, Kahn & Co., 13 T.C. 580 (1949), all advances to the subsidiary were considered capital contributions. In addition, it has been held that payment by a parent for the expenses of a subsidiary are to be deemed contributions of capital to the subsidiary by the parent. Cf. The American Rolex Watch Corp., T.C. Memo 1956-42.

In order to determine the real substance of the transaction, the intent of the parties is critical as to the real business reason for making the payment in question.

Other criteria in determining the character of the payment in question which must be weighed to include the value of what was paid as compared to the value of what was received.

Appellant submits that the Tax Court was clearly erroneous in its not reviewing the merits of the petitioner-appellant's argument that the amount paid to Rogers was in effect an additional investment in its wholly-owned subsidiary Cardinal. The Tax Court in its opinion, (App. 27), stated:

"While it appears that the Cardinal operation, which was Rogers' primary responsibility, was not profitable, Mr. Harder's solution to this problem was not to fire Rogers and replace him with another manager, but to get rid of the Cardinal operation altogether."

We agree that the purpose for making the payment to Rogers was (1) to get rid of Rogers, and (2) to get rid of the Cardinal operation. We submit that the evidence on record clearly supports such a finding. Mr. Harder testified as follows:

Q Why did you make that payment?

A We simply had to get rid of the corporation. (Emphasis added) It was a losing proposition and I could not fight the Valentine family in the courts because that would take years and years and we would have wound up out of business. (App. 81)

* * *

Q And was the payment made for any other purpose?

A Just to get rid of him and the corporation. (Emphasis added) (App. 82)

The foregoing testimony of Mr. Harder was corroborated by testimony given by the taxpayer's accountant, Keith Baker (App. 60), Frank Harder (App. 89), and Harder's new attorney, Alfred A. Marra (App. 105).

Subsequent to making the payment to Rogers in 1967, the Harders took steps to sell the business and the assets of Cardinal and in December, 1967, dissolved the corporation. (App. 17). These factors, appellant submits, clearly support

a finding that the payment made to Rogers was part and parcel of the Harders intent to get rid of the Cardinal operation and it was an additional cost in the dissolution of this losing enterprise. It was a payment made in order to cut the losses and in order to divest Harder Tree and the Harder enterprise from a continuance of a drain on its business enterprise. In reviewing the fact that Rogers gave up 22 shares of Harder Tree stock in exchange for the payment, we think that the Tax Court was clearly erroneous in placing greater weight on a contemplated merger. Had the situation been profitable, some sort of arrangement could have been made to isolate Rogers' minority interest and yet follow through with the contemplated merger of the Harder companies. Appellant submits that the real substance of the transaction was an additional investment in order to dissolve a losing entity and that such additional costs should be allowed as a loss which is proper under Section 165(g)(3) of the Code.

If this Court determines that the Tax Court finding that the payment to Rogers was in effect a capital transaction as opposed to the payment of an ordinary and necessary business expense under Section 162, then appellant submits that all, or a portion, of the amount paid was for the purpose of dissolving the Cardinal corporate entity.

Point II

II. The Tax Court erred in its finding that the payment of \$100,677.44 was solely for the repurchase of stock and thus a capital transaction under Section 311(a) of the Code.

Both before the Tax Court, and before this Court, petitioner-appellant has taken the alternative positions that the payment of \$100,677.44 by Harder Tree Service, Inc., to Philip Rogers was, on the one hand, an additional investment in its wholly-owned subsidiary, Cardinal Maintenance, Inc. (see appellant's argument with respect to Point I, pp.25 - 29, herein), or on the other hand, that such expenditure (or a portion thereof) was deductible as an ordinary and necessary business expense under Section 162 of the Code. Appellant submits that the Tax Court erred in its finding that such payment was merely a capital transaction under Section 311(a) of the Code. Although the payment may have been made in the form of acquiring the 22 shares of Harder Tree held by Philip Rogers, the payment was not made solely, or primarily, for the purpose of stock acquisition.

Underlying the Tax Court's error are the factors clearly enunciated by the record, which reflect that the payment was made to terminate an on-going, ever-growing contingent

liability resulting from a grossly unfair stock option agreement; to get rid of Rogers as an employee of both Harder Tree and Cardinal; and to get rid of the business operation.

The testimony of Frank Harder reflects the true intent of the payment.

Q And did you participate in the decision or the process for making a decision to pay Phil Rogers \$100,677.44?

A I did.

Q And did you at that time -- did you think that you were making a payment in full for the stock or for any other purpose to Mr. Rogers?

*

*

*

A It was my intent to get rid of him and to be honest with you, the stock had no meaning to me at that particular point. All I wanted to do was get rid of Rogers, right then and there because no matter what the cost he had to go.

Frank Harder's father, Mr. Harder, also testified that the sole purpose of making the payment to Rogers was "to get rid of him and to get rid of the corporation." (App. 81, 82) An additional factor which must be considered, and which will be explored in depth in Point III of this argument, is that payment of \$100,677.44 was made to acquire stock which had a value of \$4,872.00. Obviously, the value of the stock acquired

was of little or no importance to the Harders. The real value of what was to be acquired, was their ability to cut their losses and to dispose of the Cardinal entity, or alternatively, the real value of what was acquired, was to divest themselves of the future services of Philip Rogers.

Appellant is cognizant that the foundation of this Point of error must be supported by the proposition that this Court must give credence to the substance rather than the legal form of the transaction. The Supreme Court of the United States has long held that the interpretation of principles of Federal taxation are governed by substance rather than form. Commissioner v. Heininger, 320 U.S. 467, 64 S. Ct. 249 (1943). Appellant urges this Court to recognize the true substance of the transaction in question.

Points III and IV

III. The Tax Court erred in its holding that the payment to Rogers was not an ordinary and necessary business expense under Section 162 of the Code.

IV. The Tax Court erred in its holding that the payment to Rogers, to the extent that it exceeded the fair market value of the stock received, was a form of additional compensation or termination pay to Rogers and therefore deductible under Section 162 of the Code.

The findings of fact and the opinion of the Tax Court with respect to the theory put forth by the petitioner-appellant on the issue of deductibility of the payment made to Rogers as an ordinary and necessary business expense is in the opinion of the appellant clearly erroneous as to its finding of facts, application of such erroneous facts, and conclusions of law. Appellant in its brief before the Tax Court relied as its authority for allowance of the deductions in question, on two leading cases as enunciated by the United States Courts of Appeal, for the Third and Seventh Circuits; Capitol Indemnity Ins. Co. v. Commissioner, 237 F. 2d 901 (C.A. 7, 1956), reversing, 25 T.C. 147 (1955), and Five Star Manufacturing Co. v. Commissioner, 355 F. 2d 724 (C.A. 5, 1966), reversing and remanding, 40 T.C. 379 (1963).

The basis for allowability for deductions under Section 162 as an ordinary and necessary business expense in both of the foregoing cases was that the payment was made for the purpose of relieving the taxpayers from burdensome contracts which precluded the taxpayers from continued profitable operations. In the case of Capitol Indemnity Ins. Co., supra, it was held that a payment made to acquire stock of another corporation in order to facilitate the cancellation of onerous insurance agency agreement which made it impossible for the taxpayer to operate profitably, was deductible as an ordinary and necessary business expense. See, also, Metropolitan Co. v. United States, 176 F. Supp. 195 (S.C., Ohio, W.D., 1959), and Pressed Steel Car Co., Inc., 20 T.C. 198 (1953).

In Five Star Manufacturing Co., supra, the Fifth Circuit permitted the taxpayer corporation to deduct as an ordinary and necessary business expense the cost of acquiring the business interests of a 50% stockholder. Two individuals each owned 50% of the stock of the company, which was in serious financial straits, and near receivership. The presence of one of the individuals as a shareholder was preventing the company from entering into an agreement with an outsider which was necessary for the survival of the company. After obtaining a judgement against the stockholder for monies

he owed to the company, the company purchased all of that shareholders stock at a judicial sale and claimed a Section 162 deduction for the entire purchase price. The Fifth Circuit concluded in Five Star, supra, 355 F. 2d at 727:

"To be deductible as a business expense the payment must be both ordinary and necessary. It seems unquestionable that the payment. * * * to terminate his (the shareholders) interest in Five Star was a necessary expense * * *. It can scarcely be held that the payment * * * was for the acquisition of a capital asset, but rather one which would permit Five Star to use assets for income production by freeing its management from unwarranted fetters."

The Fifth Circuit also found deductibility was possible in another case which appeared to be a capital transaction in the case of United States v. Philip K. Smith, 418 F. 2d 589 (C.A. 5, 1969).

In the Smith case, amounts were paid by the taxpayer's wholly-owned corporation to settle a receivership action brought by the taxpayer's former partner against the taxpayer's partnership, which constituted an encumbrance on the partnership property then held by the corporation. The Fifth Circuit remanded the case to the District Court in order that a determination be made as to the nature of the assumption of liability by the corporation. In doing so, it instructed the trial Court to the effect that if the factual inquiry

revealed a primary purpose other than the acquisition of property, the Court could properly allow a deduction to the corporation under Section 162 of the Code.

In the instant case, appellant urges this Court to adopt a broad principle that: if a corporate taxpayer makes payment to relieve itself of an ever-growing, contingent obligation, which in all events must be paid,⁶ and the basis for such payment has no correlation to the value of what is to be received, that in such event, notwithstanding that the transaction takes the form of acquiring corporate stock, the amount paid should be allowed as an ordinary and necessary business expense under Section 162 of the Code.

In the instant case, it is clear, as it was in Five Star, that the termination of Rogers' relationship with Harder Tree and Cardinal was freeing the management of these companies from Rogers' "unwarranted fetters." It is clear from his track record as President of Cardinal, that Rogers was bent on increasing sales without regard to whether Cardinal was a profitable operation. He obviously did this

⁶Rogers or his estate at some point in time, either upon termination of employment or upon his death, would have had a claim against Harder Tree and payment would have been required under the stock option agreement barring litigation to set it aside.

in order to assure a larger payment upon termination of his employment. Clearly this manner of conducting business was not consistent with good business practice and was in the nature of a harassment to the Harders and Harder Tree. The Harders, therefore, in order to assure the continued operation of the Harder Tree business and to relieve themselves of an onerous burden, decided to get rid of Rogers and his unprofitable Cardinal business operation.

The Tax Court, while recognizing the validity of Capitol Indemnity Ins. Co., supra, and Five Star, supra, held that the cases of H & G Industries Inc. v. Commissioner, 495 F. 2d 653 (C.A. 3, 1974), aff'g, 60 T.C. 163 (1973), and Jim Walter Corporation v. United States, 498 F. 2d 631 (C.A. 5, 1974), narrowed the holding of Capitol Indemnity and Five Star to those factual situations where there was a showing that the payment was necessary to the survival of the corporation.

In H & G Industries, Inc., supra, certain restrictions were imposed on the taxpayer's financial activities under the provision upon which certain convertible preferred stock was issued. Sometime after the issuance of such convertible preferred stock, the taxpayer exercised its call privilege and redeemed the stock by paying a call premium to the holders

of these shares as part of the price of redemption. The taxpayer claimed the aggregate amount of the call premium as a deduction under Section 162 of the Code on the theory that the restrictions imposed upon the issuance of such convertible preferred stock was an onerous burden on the corporation and that the payment of the call premium was necessary to redeem the stock and was, therefore, an ordinary and necessary business expense. The Fifth Circuit distinguished Five Star Manufacturing, supra, by holding in H & G Industries, supra, that the acquisition of the preferred stock was merely a refinancing transaction by a financially healthy corporation and was not necessary to the survival of the corporation.

In another Fifth Circuit case, Jim Walter Corporation, supra, it was held that a corporate taxpayer could not deduct as a business expense, an amount it paid to purchase outstanding warrants. The Court in arriving at its conclusion, analyzed the origin and character of the deduction under the principle of United States v. Gilmore, 372 U.S. 39 (1963), and both the Fifth Circuit in Jim Walter Corporation, supra, and the Tax Court in the instant case quoted from Gilmore the following passage:

"[T]he origin and character of the claim with respect at which an expense was incurred, rather than its potential consequence upon the fortunes of the taxpayer, is the controlling basic test of whether the expense was business "or personal" and hence whether it is deductible or not - - -."

Your appellant also concurs that the origin and character of the claim is significant. However, the origin and character should be viewed from the prospective of how the parties involved looked at the Agreement at the time it was executed; and, further, how they viewed it at the time the payment was made. The facts of record which the Tax Court partially found and partially ignored indicate that: (1) the critical Stock Option Agreement was drafted in 1964 by an attorney who was related by marriage to Rogers and who represented both parties to the transaction; (2) the Harders did not realize the significance of the formula for buying back the stock, which was based on a multiple of gross sales, until November of 1966; (3) upon realizing the significance, the Harders decided almost immediately that the contract had to be terminated; and (4) the payment was made in order to cut off a further drain on the Harder enterprises. Accordingly, the character of the initial agreement as contemplated in 1964 by the Harders was not the motivating force behind the payment that was ultimately made. In this regard, Mr. Harder testified:

Q Did you have any thought in your mind (in 1964) as to what you would have to pay to Mr. Rogers to reacquire the shares of stock that he was receiving?

A Only that it would be somewhere around ten or fifteen or twenty thousand dollars.

The Tax Court failed to distinguish between the subjective intent of the Harders at the time of signing the agreement and their motivations at the time the payment was made. Their motives at the time the payment was made obviously were to save Harder Tree from ultimate financial disaster by cutting off an ever-growing contingent liability.

The Tax Court applying the principles of H & G Industries, supra, and Jim Walter Corporation, supra, committed its most significant error in finding that the Stock Option Agreement did not threaten the very survival of the Harder Tree corporate existence. It based its opinion on the following factors:

(1) The elimination of Rogers' interest in Harder Tree (and in the future combined Harder companies) was not dictated by outside forces directly threatening Harder Tree's pest control business, but was motivated by the financial and corporate planning considerations of its majority owners.

(2) The fact that Harder Tree was able to and did pay Rogers over \$100,000.00 in cash, despite the advice of their attorney, itself undermined any argument that Rogers' potential right to have such payment in the future was a threat to Harder Tree's survival.

(3) The principle motivation for the payment to Rogers was to eliminate his minority position in Harder Tree and thereby facilitate the merger of the various Harder companies.

The Appellant submits that all of the foregoing findings were clearly erroneous and contrary to the facts of record. In rebuttal, Appellant submits the following facts:

(1) The Stock Option Agreement provided that Rogers could require Harder Tree to buy the 22 shares at any time within six months after termination of his employment. In this regard, under the Employment Covenant Agreement, which was executed simultaneously with the Stock Option Agreement, Rogers employment could be terminated by either party upon two weeks notice. Obviously, Rogers would have put the stock to Harder Tree sometime during the six-month period after his employment was terminated. Accordingly, employment and equity ownership were integrally intertwined.

(2) Harder Tree borrowed the funds from Harder Extermination Service, Inc., in order to make payment which in turn arranged the financing to provide such funds to Harder Tree. (See, Jt. Ex. 10-J, Minutes of Special Board of Directors of Harder Tree Service, Inc., of September 1, 1966). Harder Tree had only \$3,286.85 in cash of December 31, 1966. It had a net equity as of the same date of \$40,589.67.

(See, Jt. Ex. 20-T, p. 4) It does not take an economic genius to calculate that payment of \$100,000, or worse, the continuance of an ever-growing contingent liability, seriously threatened business survival of Harder Tree.

(3) Mr. Keith Baker, a certified public accountant, and the party who brought to the attention of the Harders for the first time in November, 1966, the real significance of the Stock Option Agreement in his memorandum, pointed out that without the infusion of additional capital, Harder Tree with the onus of the Stock Option Agreement upon it, could not survive. (See, Pet. Ex. 31, p. 2.)

(4) F. Kenneth Harder in his testimony before the Tax Court stated:

"We simply had to get rid of the corporation. It was a losing proposition and I could not fight the Valentine family in the Courts, because that would take years and years and we would have wound up out of business." (Emphasis added) (App. 82)

(5) And in response to the question as to whether the payment was made for any other purpose, Mr. Harder responded:

"Just to get rid of him and the corporation."
(App. 82)

(6) Frank Harder testified as to why the Harders did not follow the advice of Mr. Baker and Mr. Marra to wit:

"Well, for both family, personal and fiancial reasons. The Valentine family could buy us and sell us in a minute; they'd be dragging us through the Courts for years, and it could have cost us a fortune, and we might have lost our business. It was better to cut the cards right then and there, pay him, and get away from him fast." (Emphasis added) (App. 89)

The foregoing facts clearly indicate that the Tax Court was clearly erroneous as to its holding that Petitioner-Appellant did not demonstrate that the continuance of Harder Tree's contingent obligation to repurchase Rogers' stock was not a threat to the very survival of the corporate existence of Harder Tree. The clear unequivocal fact is that the Harders in November, 1966, realized the traumatic, detrimental potential of the Stock Option Agreement tempered by a continuous losing operation of Cardinal business operation and determined, right then and there, that the Stock Option Agreement and the Cardinal operation had to be immediately terminated.

In response to the Tax Court's finding that there were no external forces as there were in the cases of Capitol Indemnity Ins. Co., supra, and Five Star, supra, the record also indicates that social coercion, fear of law suits and fear of having the Harder name and limited capital resources dragged through elongated litigation and the onus of an ever-increasing liability, forced the Harders to recede and

pay a price which was far in excess of fair market value of what was received.

As to the Tax Court's view that the termination of Rogers' interest in Harder Tree was effected in order to facilitate the ultimate merger of the Harder companies, Appellate submits that although the merger of the Harder enterprises was being considered at the time, the primary factor that motivated the termination of Rogers' employment and the payoff on the Stock Option Agreement was the discovery by the Harders of the gross sales formula and its continued threat to the survival of the Harder enterprises.

As to the Appellant's alternative theory, that to the extent that the payment of \$100,677.44 to Rogers exceeded the fair market value of \$4,872.00, Appellant submits that the Tax Court was clearly erroneous in its finding that the Harder solution was not to fire Rogers but to get rid of the Cardinal operation altogether. Its finding is inconsistent with its further finding that the termination of his employment could not be separated from the contemporaneous elimination of his interest in Harder Tree. An additional inconsistency is the erroneous supposition that Rogers would not have been paid anything with respect to the termination of his employment had he wished to retain his 22 shares of

Harder Tree stock. Appellant submits that it's incredulous to think that if and when Rogers' employment was terminated, that he would not have exercised his option to put the stock to the company within the six-month period. To let such six-month period elapse without putting his stock, although possible, seems too economically remote to consider.

The record is quite clear on two points: (1) Harder Tree made a payment to Mr. Rogers under a Stock Option Agreement that was integrally webbed into the Employment Covenant Agreement; and (2) in return for the payment of \$100,677.44, Harder Tree only received capital stock which had a than fair market value of \$4,872.00. The fact that the Tax Court failed to find the true fair market value of the stock in the face of the impeccable testimony of Mr. William A. Gill is in itself an obvious manifestation that the Court was attempting to structure a fact pattern that clearly deviated from reality. Once finding true market value, what then was the purpose or consideration received for the excess over such value, or \$95,805.44? As in the case of William C. Atwater & Co., Inc., 10 T.C. 218, 247 (1948), Appellant submits that it can reasonably be concluded that this amount represented additional compensation to Rogers for his services from August 1, 1964 to January 20, 1967, the date his employment was terminated. As pointed

out in the Atwater case, supra, the fact that such additional compensation is for services rendered in prior years is not material, Lucas v. Ox Fibre Brush Co., 281 U.S. 115 (1930), Hudson Motor Car Co. v. United States, 3 F. Supp. 384, (Ct. Cls., 1933). The Commissioner in Revenue Ruling 58-614, 1958-2 C.B. 921, in dealing with question of stock redemptions stated:

"In these transactions, if a shareholder surrenders stock to a corporation for less than its fair market value, such surrender may be a gift or compensation to the shareholders who remain interested in the corporation. Conversely, if a corporation pays more than the fair market value for its stock, the payment may be compensation to the shareholder surrendering stock or may be a gift to him from the shareholders who remain interested in the corporation." (Emphasis added)

Obviously, the Harders were not intending to make a gift to Rogers; therefore, the payment made had to be in the nature of severance pay and should, as an alternative, be allowed as a deduction under Section 162 of the Code.

Appellant submits that the evidence on the record clearly warrants a minimum finding that to the extent that Harder Tree did not receive consideration or acquire a capital asset for the amounts paid to Philip Rogers, that it is entitled to an ordinary and necessary business deduction.

Conclusion

For the foregoing reasons, it is respectfully submitted that the decision below is erroneous and should be reversed.

Respectfully submitted,

s/John K. Antholis

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